University of Michigan Journal of Law Reform

Volume 15

1982

Making Campaign Finance Law Enforceable: Closing the Independent Expenditure Loophole

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MAKING CAMPAIGN FINANCE LAW ENFORCEABLE: CLOSING THE INDEPENDENT EXPENDITURE LOOPHOLE

Over a span of seventy-five years Congress has struggled to protect the electoral process from the corrupting influence of large campaign contributions and expenditures.[1] These efforts culminated in 1971 with the passage of the Federal Election Campaign Act ("FECA"),[2] the most comprehensive legislation to date regulating campaign spending. Ruling on the constitutionality of the Act in *Buckley v. Valeo*,[3] the Supreme Court upheld limits on contributions made by individuals and political committees directly to candidates, but struck down limits on expenditures made independently of a specific candidate.[4] The

1. For a brief history of federal election regulation, see Buckley v. Valeo, 519 F.2d 821, 904 app. C (D.C. Cir. 1975) (per curiam en banc), *aff'd in part and rev'd in part*, 424 U.S. 1 (1976) (per curiam). The modern era of federal campaign reform began in 1907 when Congress enacted the Tillman Act, ch. 420, 34 Stat. 864 (1907) (repealed 1909), which prohibited national banks and corporations chartered by Congress from making political contributions in any election. In 1910, Congress passed the first federal disclosure law, Act of June 25, 1910, ch. 392, §§ 5-6, 36 Stat. 822, 823 (repealed 1925). Eight years later, Congress made the offering of money to influence voting a criminal penalty. Act of Oct. 16, 1918, ch. 187, 40 Stat. 1013 (repealed 1925). In 1925, these disclosure requirements were incorporated and broadened by the Federal Corrupt Practices Act, 1925, ch. 368, tit. III, 43 Stat. 1070 (repealed 1972). The last major piece of campaign finance reform legislation to be passed before the early 1970's was the Hatch Act, ch. 410, 53 Stat. 1147 (1939) (current version in scattered sections of 1, 5, 18 U.S.C.), which banned overt political activity by all federal employees, except presidential appointees.

2. Pub. L. No. 92-225, 86 Stat. 3 (1972) (current version at 2 U.S.C. §§ 431-455 (1976 & Supp. IV 1980), and scattered sections of 18, 47 U.S.C.).

3. 424 U.S. 1 (1976) (per curiam).

4. *Id.* at 23-50. The Court upheld the following limits on individual campaign contributions: a ceiling of $1000 on contributions to a specific candidate in a given campaign, 2 U.S.C. § 441a(a)(1)(A) (1976); a maximum of $20,000 in donations to a political party in a given calendar year, *id.* § 441a(a)(1)(B); and a $25,000 cap on all contributions to candidates, parties, and committees in a calendar year, *id.* § 441a(a)(3). In addition, the Court upheld statutory provisions barring multicandidate committees, or political action committees ("PAC's"), from contributing more than $5000 to any candidate in an election, *id.* § 441a(a)(2)(A), more than $15,000 to a national political party in a calendar year, *id.* § 441a(a)(2)(B), or more than $5,000 to any other political committee in a calendar year, *id.* § 441a(a)(2)(C). The *Buckley* Court also upheld public financing and disclo-

Court distinguished contributions from independent expenditures on the basis that the latter did not involve "prearrangement and coordination" between candidate and spender[5] and thus did not pose a threat of corruption to the electoral process.

Following *Buckley,* Congress amended the FECA to bring the Act within the standards established by the Court.[6] The statute defines an "independent expenditure" as one "advocating the election or defeat of a clearly identified candidate which is made without cooperation or consultation with any candidate."[7] Since the *Buckley* ruling, however, it has become increasingly apparent that independent expenditures are being used to circumvent contribution limits. The loophole has been made possible by the *Buckley* Court's failure to define the type of communication between candidate and spender needed to establish coordination. The Court held that coordination exists where the two parties communicate directly[8] (actual coordination), but did not rule whether a finding of coordination was justified where cooperation between an official campaign and a contributor occurs through indirect communication (effective coordination). This uncertainty over which acts constitute coordination has enabled wealthy individuals and political action committees ("PAC's") to make enormous contributions under the guise of "independent expenditures."[9] The result has been a torrent of political contributions that threatens the integrity of the electoral process.[10]

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sure limits while striking down limits on independent expenditures and expenditure ceilings for candidates and parties. 424 U.S. at 143.

5. 424 U.S. at 47. The terms "contribution" and "contributor," as used throughout this Note, refer to a contribution or a person making a contribution to an official candidate's authorized campaign. The terms "independent expenditure" and "independent spender" refer to an expenditure or person making an expenditure which is independent of the official campaign; these terms, however, may include a contribution to an organization not affiliated with the official campaign whose purpose is to make independent expenditures. The term "expenditure" or "spender" is neutral, and refers neither to "contribution" nor "independent expenditure."

6. *See* Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, 90 Stat. 475 (codified as amended in scattered sections of 2, 18, 26 U.S.C.).

7. 2 U.S.C. § 431(17) (Supp. IV 1980).

8. *See* 424 U.S. at 46-47.

9. *See infra* notes 45-53 and accompanying text.

10. The dramatic rise in independent campaign spending by interest groups between 1976 and 1980 demonstrates that independent expenditures are being used to exploit the loophole left by the *Buckley* Court with respect to contribution limits. In 1980, interest groups and PAC's involved in electoral politics spent $16.1 million independently of candidates, campaign committees and party bodies, with $13.7 million of that total devoted to the presidential race. In contrast, 1976 independent campaign spending totalled one-eighth of this amount. For a breakdown of these figures between parties and type of PAC involved, see Clymer, *$10 Million Spent for Reagan in '80,* N.Y. Times, Nov. 29, 1981, §

The factual issues raised in *Common Cause v. Schmitt*[11] illustrate the scope of the problem created by this ambiguity. In *Schmitt*, the court rejected two separate claims brought by the Federal Election Commission ("FEC") and Common Cause[12] against five political committees for violation of the statutory limit on expenditures that could be made by unauthorized political committees on behalf of a publicly financed presidential candidate.[13] In addition to the complaint filed against the committees, Common Cause alleged that the five committees had coordinated activity with the Reagan campaign.[14] No evidence was offered showing direct communication between the committees and the official campaign, but Common Cause did document a systematic pattern of informal links — achieved through networks of friends, shared consultants, and public press conferences — which had permitted the committees and the campaign to work in concert without being subject to statutory limitations on expenditures.[15] The district court rejected this claim, ruling that Common Cause had failed to secure subject matter jurisdicton.[16] The FEC, on the other hand, was still free to pursue enforcement on coordination grounds.[17] While aware of the evidence submitted by Common Cause, the Commission did not make a finding of coordination. The FEC's decision not to bring suit[18] reflects the inadequacy of the *Buckley* standards: by neglecting to provide lower courts and the FEC with a clear definition of coordination, the Court has unwittingly permitted prearranged activity to go unchecked if carried out clandestinely.

1, at 33, col. 1. For figures on total spending (contributions and expenditures) in the 1980 elections, see N.Y. Times, March 29, 1981, § 1, at 31, col. 1.

11. 512 F. Supp. 489 (D.D.C. 1980), *aff'd per curiam by an equally divided court*, 50 U.S.L.W. 4168 (U.S. Jan. 19, 1982) (No. 80-847).

12. Common Cause is a self-styled nonprofit, nonpartisan citizens' lobbying group based in Washington, D.C.

13. *See* 26 U.S.C. § 9012(f) (1976). The court rejected these claims on the grounds that the limit was an unconstitutional infringement of first amendment rights under *Buckley*. 512 F. Supp. at 493.

14. 512 F. Supp. at 501-03. Common Cause claimed that the coordinated activity violated provisions of the Presidential Election Campaign Fund Act, 26 U.S.C. §§ 9003(b)(1)-(2), 9012(a)(1), 9012(b)(1) (1976).

15. For a more thorough discussion of *Schmitt*, see *infra* notes 45-53 and accompanying text.

16. 512 F. Supp. at 501-02.

17. *Id.* at 502.

18. *See id.* at 502 n.54 ("The FEC contended . . . that its 'suit clearly differs from Common Cause's suit as the Commission's suit does not seek enforcement of the Act,' rather, it 'seek[s] only [a] declaratory judgment of the construction and constitutionality of 26 U.S.C. section 9012(f) pursuant to 26 U.S.C. section 9011(b)'. ") (quoting FEC Motion to Dismiss at 11 & n.8)).

This Note explores the problems posed by present attempts to define "coordination." Part I discusses generally the complexities of the coordination problem under *Buckley*, setting forth the rationale behind the *Buckley* rule and examining present efforts by Congress and the FEC to enforce the *Buckley* standards. Part I concludes by proposing a new definition for "coordination" designed to improve enforcement of the *Buckley* rule. Part II presents an alternative means for remedying the coordination problem. Rather than relying on a redefinition of coordination for proper enforcement of federal election law, this section proposes prophylactic legislation designed to regulate independent spending for political advertising in the electronic media, an area of the electoral forum where coordination is most likely to occur.

I. THE COORDINATION PROBLEM UNDER *Buckley*

A. The Rationale Behind the Buckley *Rule*

Prior to 1972, efforts to control campaign spending proved largely ineffective. Statutes banning contributions by corporations or labor unions and limiting annual expenditures from national political organizations were circumvented by political committees purporting to be independent of the candidate and his designated campaign committees.[19] The skyrocketing cost of federal election campaigns in the late 1960's[20] finally prompted

19. Shortly after the Hatch Act, ch. 410, 53 Stat. 1147 (1939) (current version at scattered sections of 1, 5, 18 U.S.C.), was passed, strict ceilings were imposed on contributions by individuals and expenditures by national political committees, Act of July 19, 1940, ch. 640, §§ 4, 6, 54 Stat. 767, 770, 772 (repealed 1948 & 1976). Total expenditures of political committees were limited to $3,000,000, and contributions to candidates or political committees were limited to $5000 in any calendar year. These limits were widely circumvented by a proliferation of political committees which openly supported candidates and yet called themselves "independent." Buckley v. Valeo, 519 F.2d at 852, 905 n.1. The court of appeals in *Buckley* noted that circumvention of the statutory spending limits occurred through the proliferation of additional committees — not national political committees — claiming to be "independent" and thus not subject to spending limits. *See id.* at 904 app. C.

20. Studies by Herbert Alexander document the increasing costs of the political process. *See* H. ALEXANDER, FINANCING THE 1976 ELECTION (1979); H. ALEXANDER, MONEY IN POLITICS (1972); H. ALEXANDER, FINANCING THE 1964 ELECTION (1966). Total campaign spending on the national level increased from approximately $34.8 million in 1964, *id.* at 13, to nearly $500 million in 1980, Smith, *Financing Campaign '80: Would You Believe Half a Billion?*, N.Y. Times, Nov. 23, 1980, § 4, at E3, col. 1. *See generally* COMMON CAUSE, HOW MONEY TALKS IN CONGRESS (1979).

Congress to initiate comprehensive measures aimed at correcting these widespread abuses. In 1971, Congress passed the FECA, which, in addition to imposing limits on campaign contributions by individuals and political committees, required the disclosure of all such contributions in excess of $10,[21] and the publication of expenditures by candidates and political committees spending more than $1000 per year.[22] After passage of the FECA, concerns persisted that large independent spending by individuals and groups would create a loophole permitting circumvention of contribution limits.[23] As a result, Congress imposed a $1000 ceiling on independent expenditures made "relative to a clearly identified candidate."[24]

In 1976, however, the Supreme Court in *Buckley v. Valeo* struck down these limits on independent expenditures as unconstitutional infringements upon spenders' first amendment rights.[25] Unlike the circuit court, which had concluded that the statute furthered the government's interest in eliminating corruption without unnecessarily encroaching on first amendment rights,[26] the Court reasoned that independent advocacy posed no

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21. FECA § 302(b), Pub. L. No. 92-225, 86 Stat. 3, 12 (1972) (current version at 2 U.S.C. § 432(b) (Supp. IV 1980)).

22. *Id.* §§ 303-304, *amended by* Federal Election Campaign Act Amendments of 1979, §§ 103-104, 93 Stat. 1339, 1347-48 (current version at 2 U.S.C. §§ 433-434 (Supp. IV 1980)).

23. The FECA effectively closed the statutory loophole that allowed political committees to circumvent statutory ceilings on expenditures by describing themselves as "independent." *See supra* note 19 and accompanying text. The loophole that concerned Congress following passage of the FECA was related, but not identical to the loophole threatening these earlier election regulations; while the FECA did not allow a proliferation of so-called "independent" committees, it exempted independent expenditures from spending limits. *See Buckley*, 519 F.2d at 852-53.

24. Federal Election Campaign Act Amendments of 1974, § 101(a), Pub. L. No. 93-443, 88 Stat. 1263, 1265 (repealed 1976). The 1974 amendments placed limits on contributions, restricted the use of a candidate's personal or family funds, provided for public funding of presidential primary and general election campaigns, and established a Federal Election Commission to administer and enforce the FECA. FECA Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (codified as amended in scattered sections of 2, 5, 18, 26, 47 U.S.C.).

25. *See generally* Polsby, Buckley v. Valeo: *The Special Nature of Political Speech*, 1976 SUP. CT. REV. 1; Comment, Buckley v. Valeo: *The Supreme Court and Federal Campaign Reform*, 76 COLUM. L. REV. 852 (1976); Note, *The Unconstitutionality of Limitations on Contributions to Political Committees in the 1976 Federal Election Campaign Act Amendments*, 86 YALE L.J. 953 (1977).

26. *See* 519 F.2d at 853 ("We hold that the limitation on expenditures relative to a clearly identified candidate is a necessary and constitutional means of closing a loophole that would otherwise destroy the effectiveness of other statutory provisions."). The court fully recognized that an expenditure might "obviously inure to the benefit of a candidate" even though the candidate was not in control of the expenditure or of "the goods or services purchased." *Id.* at 852-53; *see also* Wright, *Politics and the Constitution: Is Money Speech?*, 85 YALE L.J. 1001 (1976) (arguing that the ability to spend money is not

danger of "real or apparent corruption comparable to those identified with large campaign contributions."[27] Limits on independent spending, therefore, could not withstand strict scrutiny; they burdened first amendment rights[28] without serving a compelling government interest.[29]

The Court's rejection of the loophole rationale for limiting independent spending turned on the assumption that only coordinated or prearranged expenditures posed a threat of corruption to the electoral process.[30] Independent expenditures, no matter how large, by definition did not include coordinated or prearranged expenditures and consequently posed no danger of corruption. If, on the other hand, an expenditure were not independent — and thus "coordinated" — it would automatically be

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entitled to the same first amendment protections as conventional speech).

27. 424 U.S. at 46.

28. The Supreme Court in *Buckley* noted that expenditure limitations "operate in an area of the most fundamental First Amendment activities." *Id.* at 14. Activities deserving of the broadest protection included the "unfettered interchange of ideas for the bringing about of political and social changes desired by the people," *id.* (quoting Roth v. United States, 354 U.S. 476, 484 (1957)), and the making of "informed choices among candidates for office," 424 U.S. at 14-15.

29. 424 U.S. at 51. The failure of the regulations to serve a compelling government interest was the primary factor motivating the Court's decision to strike down the limits on independent expenditures, but not the only one. The Court also concluded that limiting independent expenditures involved a more serious abridgement of first amendment rights than did limits on contributions. The Court reasoned that a limitation on the amount any one person or group can contribute directly to a campaign involves only a marginal restriction on free speech. Under this view, the quantity of communication does not increase with the size of the contribution; instead, the "expression rests solely on the undifferentiated, symbolic act of contributing." *Id.* at 21. Independent expenditures, in contrast, do not involve individual spenders speaking through a second party. Restrictions on this type of expenditure directly limit the quantity of expression by reducing the number of issues discussed and the size of the audience reached. *See id.* at 18-21.

In addition, the Court held that the limits were unconstitutionally underinclusive. In order to avoid vagueness, the Court construed the provision "to apply only to expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate." *Id.* at 44. This redefined standard, however, was flawed because it would permit "unscrupulous persons and organizations to expend unlimited sums of money in order to obtain improper influence over candidates for elective office." *Id.* at 45. Under the Court's analysis, therefore, the provision could not withstand strict scrutiny; limits on independent advocacy heavily burdened core first amendment rights without serving a compelling government interest.

30. The Court reasoned:

> The absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate. . . . [Independent expenditures made totally independently of the candidate] may well provide little assistance to the candidate's campaign and indeed may prove counterproductive.

Id. at 47.

categorized as a "contribution," and fall within the sphere of campaign spending that Congress permissibly could limit without impinging unduly upon first amendment rights.[31] In the Court's view, therefore, circumvention of contribution limits through the increased use of independent expenditures posed no danger to the electoral process because independent spending itself did not create a threat of corruption.

The Court focused on actual coordination as the activity most likely to foster corruption.[32] The Court was concerned by the opportunities for an exchange of promises accomplished through direct communication between candidate and spender.[33] To avoid this kind of quid pro quo, the Court included expenditures evincing actual coordination within the category of "contributions" that could constitutionally be limited. The Court did not discuss, however, whether expenditures involving effective — as opposed to actual — coordination should also be treated as contributions; nevertheless, it is clear from the *Buckley* Court's rationale that if effective coordination poses the same danger of corruption as actual coordination, expenditures involving effective coordination should be treated as contributions.

In short, the *Buckley* Court had no intention of preventing limitations on expenditures that create a significant threat of corruption in the electoral process.[34] If the term "coordination" is to distinguish independent expenditures from contributions, it must embrace all actions that could corrupt political campaigns; a narrow definition of "coordination" will undermine the *Buckley* holding by permitting large contributions to be made in the guise of "independent expenditures."[35]

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31. *Id.* at 46-47. Under the rationale provided by the Court, any evidence of coordination increases the likelihood of a quid pro quo between candidate and "independent" spender. As long as a threat of corruption exists, limiting campaign expenditures serves a valid government interest. In the Court's view, expenditures involving coordination are indistinguishable from direct campaign contributions in both purpose and function and therefore should be treated identically.

32. *See id.*

33. *See id.*

34. *See* Nicholson, Buckley v. Valeo: *The Constitutionality of the Federal Election Campaign Act Amendments of 1974*, 1977 WIS. L. REV. 323, 340-44 (contending that while the *Buckley* Court had no intention of striking down limits on expenditures posing a threat of corruption, its conclusion that independent expenditures posed no danger was incorrectly reasoned). *But see* Clagett & Bolton, Buckley v. Valeo, *Its Aftermath, and Its Prospects: The Constitutionality of Government Restraints on Political Campaign Financing*, 29 VAND. L. REV. 1327, 1360 (1976) (arguing that, despite the threat of corruption posed by effective coordination, limits on expenditures are not consistent with *Buckley.)*

35. This Note will not attempt to debate the validity of the Supreme Court's determination that independent expenditures are less likely to promote corruption. Regard-

B. Present Efforts to Define "Coordination"

The *Buckley* Court failed to apprehend the difficulties involved in distinguishing between independent expenditures and contributions on the basis of the presence or absence of "coordination."[36] Indeed, both the FEC and Congress have had only limited success in establishing a workable definition for "coordination" based on the *Buckley* guidelines.

1. FEC regulations— Regulations promulgated by the FEC attempt to delineate the scope of political spending not subject to the limitations imposed by the FECA, in a manner consistent with *Buckley*. The regulations define an independent expenditure as one "which is not made with the cooperation [of] . . . or in consultation with, or at the request or suggestion of, a candidate,"[37] and are based on the statutory definition that an expen-

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less of whether independent expenditures inherently promote corruption, failure to develop workable standards for applying the *Buckley* guidelines will allow circumvention of spending limits and increase the likelihood of corruption in the electoral process.

Substantial reservations have been expressed, however, about the Court's conclusion that independent expenditures are inherently less corrupting than contributions. In *Buckley*, Justice White observed that regardless how broadly coordination is defined, the possibility for a quid pro quo remains:

> Let us suppose that each of two brothers spends $1 million on TV spot announcements that he has individually prepared and in which he appears, urging the election of the same named candidate in identical words. One brother has sought and obtained the approval of the candidate; the other has not. The former may validly be prosecuted under § 608(e) . . . [but] the latter may not, even though the candidate could scarcely help knowing about and appreciating the expensive favor.

424 U.S. at 261 (White, J., concurring in part and dissenting in part). Similarly, Professor Nicholson argues that independent expenditures can be used to generate a quid pro quo even when no "prearrangement" exists. The public's conception of corruption extends to "undue influence," which does not depend on the presence of "prearrangement." Nicholson, *supra* note 34, at 340-42. Moreover, Nicholson notes, the *Buckley* Court's determination that expenditures are less effective than contributions in influencing the candidate, *see* 424 U.S. at 47, does not take into account the change in political realities since 1974. Today, PAC's and individual independent expenditures are the primary channel for money entering the political process. *See* Nicholson, *supra* note 34, at 340-42; *see also* Adamany, *PAC's and the Democratic Financing of Politics*, 22 ARIZ. L. REV. 569, 601 (1980) (arguing that large independent expenditures give rise to the appearance of impropriety); Leventhal, *Courts and Political Thickets*, 77 COLUM. L. REV. 345, 366-67 (1977) (concluding that the Court gave no adequate explanation for its refusal to defer to the legislative determination that independent expenditures would be used for corrupt purposes once contribution limits were imposed).

36. A few commentators recognized immediately after *Buckley* that by neglecting to define "coordination" the Court had created serious problems. *See* Clagett & Bolton, *supra* note 34, at 1360-61 (arguing that the "coordination problem" must be resolved on a case-by-case basis because present FEC regulations are "unworkable" and vague); *see also* Leventhal, *supra* note 35, at 366-79; Nicholson, *supra* note 34, at 340-42.

37. 11 C.F.R. § 109.1(a) (1981).

diture "made by any person in cooperation, consultation, or concert with . . . a candidate . . . shall be considered to be a contribution."[38] These provisions thus implicitly define "coordination" by distinguishing between independent expenditures and contributions based on the degree of "cooperation" or "consultation" between the spender and the candidate. Elsewhere, the regulations provide a more explicit definition of coordination as "[a]ny arrangement . . . [b]ased on information about the candidate's plans, projects, or needs provided to the expending person by the candidate, or by the candidate's agents."[39]

The fatal flaw in these provisions lies in the ambiguity surrounding the precise meaning of "coordination." While actual, overt coordination clearly falls within the FEC definition, it is uncertain whether effective coordination is encompassed as well. An independent spender who communicates directly with the candidate or campaign staff before making an expenditure unquestionably has acted in "cooperation or consultation" within the meaning of the regulations.[40] Yet, "coordination" can occur in many instances without such overt interaction between the contributor and the campaign. For example, candidates frequently reveal their strategy at public press conferences or in newspaper articles. If a political committee or individual responds to this information by spending large sums in critical areas, the candidate is certain to learn of it. Such expenditures may in turn encourage the candidate to release campaign objectives in greater detail at future press conferences in order to foster the efforts of these "independent" spenders.[41] The FEC regulations fail to indicate whether a PAC or an individual receiving information in this circuitous manner is acting "[b]ased on information about the candidate's plans . . . provided . . . by the candidate, or by the candidate's agents."[42] No direct contact has occurred, but the parties have communicated nonetheless.

Similarly, by presuming coordination whenever an expenditure is made "by or through" present or former officers of an authorized campaign committee,[43] the FEC regulations address

38. 2 U.S.C. § 441a(a)(7)(B)(i) (1976).
39. 11 C.F.R. § 109.1(b)(4)(i) (1981).
40. 2 U.S.C. § 431(17) (Supp. IV 1980).
41. *See infra* notes 50-51 and accompanying text.
42. 11 C.F.R. § 109.1(b)(4)(i)(A) (1981).
43. Under the regulations, an expenditure will be presumed to be coordinated when: Made by or through any person who is, or has been, authorized to raise or expend funds, who is, or has been, an officer of an authorized committee, or who is, or has been, receiving any form of compensation or reimbursement from the can-

situations where conspicuous ties exist between a candidate and a spender, but fail to confront the potential coordination problems where there are less manifest links. Thus, if a former official of an authorized campaign becomes heavily involved in the activities of an independent spender, the former campaign official's action will remain outside the literal scope of the FEC regulations, provided he advises the PAC informally or sits on the governing board without technically making an expenditure or allowing an expenditure to be made through him.[44]

2. The Schmitt *case*— The factual background of *Common Cause v. Schmitt*[45] reveals more precisely the manner in which the "coordination" loophole is being exploited. Each of the PAC's sued by Common Cause employed primarily four different means to communicate indirectly with the official Reagan campaign. First, several of the committees included individuals who were longstanding friends or who maintained working relationships with candidate Reagan and members of his staff. In several instances, committee members had served on the Republican National Committee or on the official committee of an earlier Reagan campaign.[46] One committee chairman candidly re-

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didate, the candidate's committee or agent. . . .

Id. § 109.1(b)(4)(i)(B).

44. *See infra* note 46 and accompanying text.

45. 512 F. Supp. 489 (D.D.C. 1980) (three-judge court), *aff'd per curiam by an equally divided court*, 50 U.S.L.W. 4168 (U.S. Jan. 19, 1982) (No. 80-847). The lower court in *Schmitt* never addressed the factual allegations presented in the complaint, because the disposition of the case turned upon the plaintiff's failure to establish subject-matter jurisdiction. *See* 512 F. Supp. at 501-02; *supra* text accompanying notes 16-18. Nonetheless, this Note draws upon the facts giving rise to *Schmitt* because they are independently verifiable and clearly illustrative of effective coordination.

46. Harrison Schmitt, chairman of the defendant Americans For Change ("AFC"), was a member of the Republican National Committee Advisory Council on Economic Affairs and a Reagan delegate to the 1980 Republican National Convention. REPUBLICAN NATIONAL COMMITTEE, ADVISORY COUNCILS COMMITTEES DIRECTORY (July 1979) (on file with the *Journal of Law Reform*). Anna Chennault, a member of the AFC steering committee, was the co-chair of the Nationalities Division of the Reagan for President Committee, a member of the Republican National Committee Advisory Committee on Fiscal Affairs, and an ex-officio member of the Republican National Executive Committee. Wash. Post, June 6, 1980, at A1, col. 2, A3, col. 4; List of Officers, Executive Committee and Members of the Republican National Committee, June 12, 1980, at 2 (on file with the *Journal of Law Reform*); REPUBLICAN NATIONAL COMMITTEE, ADVISORY COUNCILS COMMITTEES DIRECTORY (July 1979). Stuart Spencer, who helped organize the defendant Americans for an Effective Presidency ("AEP") and served at one point as its director, eventually shifted to the official Reagan campaign. Spencer ran the Reagan campaigns for Governor of California in 1966 and 1970, and was the national political director for the official 1976 general election campaign for the Republican Party candidate. *Reagan's Strategy*, NEWSWEEK, July 28, 1980, at 32; *Ronald Reagan Up Close*, NEWSWEEK, July 21, 1980, at 39; S. BLUMENTHAL, THE PERMANENT CAMPAIGN (1980). Thomas Reed, Chairman of the Expenditures Committee of AEP, was the chairman of the 1970 Reagan guberna-

vealed the type of coordination generated by these informal links: "[because] the law forbids me to consult with [candidate Reagan]. . . I've had to . . . talk indirectly with [his campaign manager] and hope that he would pass [my thoughts] along . . . and I think the messages have gotten through all right."[47]

Second, the official Reagan campaign and several of the committees shared the same campaign consultants and suppliers of campaign products.[48] Political consultants[49] have a direct financial stake in their client's success, and thus they are not likely to advise two clients having similar aims to act in a manner contrary to a common goal. While no evidence directly implicated these consultants in a "conspiracy" to coordinate expenditures, the mere fact that they were employed both by the campaign and by the various committees may have made coordination unavoidable.

Third, evidence suggested that several committees used the media to coordinate campaign strategy with the candidate. For example, on July 14, 1980, spokesmen for the official Reagan campaign publicly announced that "the South will be handled almost as a separate campaign. . . . [W]e plan to use a Southern strike force of surrogates . . . to take the battle to Carter's base. . . ."[50] Following this pronouncement, in September 1980, the National Conservative Political Action Committee declared

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torial reelection campaign, and was formerly a member of the Republican National Committee. FEC exhibit 13 to the Commission's rule 1-9(h) Statement, filed with the three-judge court in Federal Election Commission v. Americans For Change, No. 80-1754 (D.D.C. filed Aug. 4, 1980) (on file with the *Journal of Law Reform*). Senator Jesse Helms, chief organizer of the North Carolina Congressional Club, was a delegate to the Republican National Convention and a close friend of Reagan. Wash. Post, July 17, 1980, at D1, col. 1.

47. Wash. Post, July 29, 1980, at A10, col. 1 (remarks of Sen. Helms); ABC Broadcast of July 16, 1980, from the Republican National Convention (remarks of Sen. Helms).

48. The polling and survey research firm of Arthur J. Finkelstein and Associates counseled three PAC's named as defendants in *Schmitt* — Fund for a Conservative Majority, North Carolina Congressional Club, and the National Conservative Political Action Committee — as well as aiding the official Reagan campaign in both 1976 and 1980. Finkelstein himself was a member of the Advisory Committee on Campaign Services for the Republican National Committee, an authorized Reagan committee. *See* Affidavit of William E. Brock, III, Exhibit A, filed July 24, 1980, on behalf of Ronald Reagan and the Reagan For President General Election Committee, in Carter-Mondale Reelection Committee v. Federal Election Commission, No. 80-1842 (D.C. Cir.) (on file with the *Journal of Law Reform*). In addition, Bruce Eberle Associates, Inc., and Richard A. Viguerie Company, Inc., assisted several of the committees named in *Schmitt* in addition to advising the official Reagan campaign. Dionne, *Small Gifts to Allow GOP to Outspend Foes in Fall*, N.Y. Times, July 20, 1980, § 1, at 14, col. 3; Balt. Sun, June 6, 1980, at A4, col. 1.

49. A "political consultant" is a paid public relations expert trained in direct-mail fund raising or newspaper, television, and radio advertising.

50. Wall St. J., July 14, 1980, at 1, col. 1.

that starting September 29 and continuing through the election it would buy television time in Alabama, Louisiana, Mississippi, and Florida for the purpose of broadcasting anti-Carter commercials.[51]

Finally, indirect communication occurred through transmission of materials prepared by candidate Reagan's staff. One newspaper report noted, for instance, that the Reagan campaign staff had provided one of the committees with a mailing list to carry out a direct-mail drive.[52]

These varied campaign abuses illustrated by the facts surrounding *Schmitt*,[53] all examples of effective coordination, ap-

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51. Wash. Post, Sept. 24, 1980, at A3, col. 1.

52. The fountainhead of Mr. Reagan's mail drive was a list of 180,000 names left over from his unsuccessful 1976 Presidential campaign. The list became the property of Citizens for the Republic, an organization started by Mr. Reagan and his aides as a fund-raising vehicle for conservative causes. The Citizens for the Republic's list, in turn, has been rented in a growing mailing-list market to a wide array of conservative groups, including the Fund for a Conservative Majority.

N.Y. Times, June 30, 1980, at B13, col. 1.

53. See *infra* notes 76-77 for additional examples of indirect communication alleged by Common Cause in *Schmitt*.

The facts that gave rise to *Schmitt* do not provide the only example of abuses resulting from present efforts to define "coordination." In recent senatorial campaigns, several candidates' official committees sent prospectuses to PAC's discussing the elections generally and the opponents' strengths and weaknesses. For example, 2000 PAC "kits," complete with information about the incumbent's political vulnerabilities, were employed extensively by the successful Iowa senatorial campaign of Charles Grassley in 1980. N.Y. Times, Oct. 8, 1980, at B6, col. 2. The Grassley campaign solicited nearly $500,000 in direct contributions from PAC's, which accounted for approximately 30% of the money raised by the campaign. The campaign designated one full-time staffer to act as liason with the PAC's. The stated purpose of the PAC "kits" was to solicit contributions from committees who had already given to the campaign but were still below the legal contribution limit of $5000. The unstated effect, however, was to give PAC's interested in making independent expenditures over and above the $5000 limit a detailed analysis of where their money would be best spent. *Id.*

A literal reading of the FEC's definition of coordination does not cover this type of activity. Technically, these brochures do not constitute information "provided to the expending person by the . . . candidate's agents with a view toward having an [independent] expenditure made." 11 C.F.R. § 109.1(b)(4)(i)(A) (1981). Rather, this information was provided for the purpose of having *contributions* made. It would be difficult indeed to prove that a contributing PAC had used this information to make an independent expenditure at a later date. For additional discussion of the Grassley campaign, see Weinraub, *Million-Dollar Drive Aims to Oust 5 Liberal Senators*, N.Y. Times, March 24, 1980, at B6, col. 3.

Abuse of the independent expenditure loophole was not limited to the 1980 campaign. In 1976, the Ford campaign charged that Delegates for Reagan, a Texas group supporting candidate Reagan, was not independent of the official Reagan Texas campaign. The Ford campaign noted that the two groups shared offices and facilities, and that more than 20 members of the allegedly independent group were members of the official Texas Citizens for Reagan Committee. *See* H. ALEXANDER, FINANCING THE 1976 ELECTION 518 (1979).

pear to present the same threat of corruption to the electoral process as actual coordination involving direct communication between the contributor and the campaign.[54] Regardless of whether it occurs with assistance from the news media, an old friend, or a political consultant, prearranged activity creates a danger that expenditures "will be given as a quid pro quo for improper commitments from the candidate."[55] The *Buckley* Court stressed that only the "absence of prearrangement" removes the danger of corruption.[56] Use of a third party to facilitate transfers of information between spenders and candidates does not strip the element of "prearrangement" from activity that would otherwise be considered coordinated and thus within the scope of FEC regulations. If, therefore, the *Buckley* distinction between contribution and independent expenditure is to be enforced, a more comprehensive definition of coordination is needed.

C. Redefining "Coordination"

The factual background of *Schmitt* makes clear that current FEC regulations do not address the entire range of problems contemplated by *Buckley* because they do not encompass instances of indirect coordination. In order to avoid continued and flagrant circumvention of contribution limits,[57] it is essential that new, workable guidelines be developed to enforce the *Buckley* standards.

In determining whether communication between candidates and independent spenders constitutes coordination for purposes

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54. It is unclear whether the Court foresaw the effective coordination problem when it handed down *Buckley*. *Cf. supra* note 36 (noting the difficulties arising from the Court's failure to define "coordination").

55. *Buckley*, 424 U.S. at 47.

56. *Id.*

57. *See* Weinraub, *supra* note 53, at B6, col. 3 (John Dolan, the chairman of the National Conservative Political Action Committee, "concede[d] that his efforts to unseat the five [liberal Senators were] rooted in a loophole created by the United States Supreme Court when it ruled in 1976 that independent groups could spend unlimited amounts on political causes, as long as they did not coordinate their efforts with any candidate.").

The uncertainty surrounding current interpretation of the *Buckley* standards has not only had the effect of permitting circumvention of contribution limits, but in some instances it has also had the effect of discouraging truly independent expenditures from ever being made. *See* H. ALEXANDER, FINANCING THE 1976 ELECTION 364-65 (1979) (noting that the Carter presidential campaign of 1976 was so concerned about the complexities of the FEC regulations that it established a policy of advising supporters not to make independent expenditures).

of the FECA, the FEC and the courts must be prepared to examine the intent behind campaign expenditures. Spenders' motives, however, often are not readily discernable. In some instances, the spender may intend to make a truly independent expenditure, and evidence of indirect communication with the campaign is merely coincidental. Thus, an accurate evaluation of motive requires examination of the circumstances surrounding the expenditure. Only then will it become apparent whether the spender intends primarily to run a "shadow campaign" by clandestinely coordinating contributions with the candidate, or whether the spender seeks to engage in truly independent advocacy. If the primary purpose is to make an independent expenditure, then under the standards set forth in *Buckley* the expenditure cannot be regulated without violating the first amendment. If, however, after careful examination it is clear that clandestine coordination has occurred, the expenditure should be treated as a contribution and made subject to the $1000 statutory limit.

1. A proposed test— This Note proposes a seven-part test to distinguish expenditures involving effective coordination from truly independent campaign expenditures.[58] The criteria set forth below establish guidelines to evaluate campaign spending in a manner that will simplify and standardize application of the *Buckley* standards.

a. Indirect communications through the news media— Systematic use of the news media by the candidate or campaign staff to transmit messages to independent spenders poses the same danger of coordination or quid pro quo as direct communication. In *Schmitt,* for instance, statements made by campaign workers[59] indicated that indirect communication through the media was used successfully to achieve coordination.

Circumstantial evidence indicating indirect communication through the news media, however, cannot always be verified through other sources. Assuming that the definition of coordination is eventually made stricter to encompass information being

58. To date, neither the FEC nor legal commentators have proposed a coherent test to be applied when determining if coordination is present. Several advisory opinions by the FEC offer guidance supplementing the regulations, but their scope is limited to particular fact situations. *See* Advisory Opinion 1979-80, FED. ELECTION CAMP. FIN. GUIDE (CCH) ¶ 5469 (Mar. 12, 1980); Response to Opinion Request No. 777 (FEC Dec. 7, 1976).

59. In one instance, Kenneth F. Boehm, the treasurer of Fund for a Conservative Majority ("FCM"), declared that contact with Reagan officials was unnecessary because "we pretty much know what the campaign strategy is from the newspapers." N.Y. Times, June 30, 1980, at B13, col. 1; *see also* Boston Globe, May 28, 1980, at 1, col. 1 ("FCM has monitored the Reagan campaign closely; whenever he is in trouble or broke, they move in swiftly and skillfully.").

passed through the media, campaign officials will inevitably become more careful about publicizing their intentions. Given the first amendment rights of candidates to make campaign strategies public, and given that all potential independent spenders have access to information that is broadcast in addition to their own right to publicize "campaign strategies," determining whether "independent" spenders have used the media for purposes of coordination becomes a complex proposition.[60] One answer to this problem is to require that there be evidence of *systematic* exploitation of the news media for purposes of communication and coordination.[61] This requirement ensures that only those candidates and spenders intending to coordinate would suffer curtailment of their first amendment rights. While an isolated coincidence could occur indicating communication between a campaign and a spender, it is unlikely that a pattern of expenditures involving indirect communication through the media could be established unless the candidate were actually attempting to achieve coordination.[62]

b. Shared consultants— Political consultants are not disinterested parties; they have a financial interest in seeing that their candidate prevails. A consultant seems likely, therefore, to serve as a conduit for coordinating expenditures between the "independent" spender and the official campaign.[63] Thus, the sharing of consultants by spenders and candidates suggests coordination. This element of the proposed test draws support from a general proposition contained within the FEC regulations; the Commission has indicated that a presumption of coordination between a political committee and the official campaign will be established where the "two entities consistently purchase goods

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60. Moreover, allowing evidence of indirect communication through the news media to establish a presumption of coordination may have a chilling effect on the first amendment rights of the candidate and campaign staff. A candidate might feel compelled to curtail his interactions with the press if the danger existed that such activity could be used to establish coordination. *Cf.* Speiser v. Randall, 357 U.S. 513, 526 (1958) (vague statutory standards may cause the speaker to "steer far wider of the unlawful zone" than he otherwise would).

61. "Systematic exploitation" refers to methodical, thorough, or regular use of the news media to publicize campaign strategy or other potentially valuable information. The inquiry should focus upon patterns of activity not normally seen in the typical operations of a PAC or individual independent spender.

62. If, for example, a PAC repeatedly engages in a flurry of activity in particular regions of the country immediately after an official campaign has publicly declared it needs help in those areas, a presumption of coordination would be permissible, *see infra* notes 79-84 and accompanying text. An isolated episode would not be sufficient to establish intent to coordinate.

63. The FEC's general counsel supports this conclusion. *See* Advisory Opinion 1979-80, FED. ELECTION CAMP. FIN. GUIDE (CCH) ¶ 5469, at 10,525 (Mar. 12, 1980).

and services from common sources."[64]

c. Use of materials provided by the candidate— FEC regulations state that financing the dissemination, distribution, or republication of campaign materials prepared by the candidate shall be considered a contribution for the purpose of contribution limits.[65] The regulations, however, do not cover situations where materials furnished by a candidate or campaign staff are used by a political committee or individual to plan strategy but are not disseminated or republished.

It is unlikely that material prepared by the candidate would fall into the hands of an independent advocate unless some degree of coordination were involved.[66] Thus, material provided to independent spenders by candidates should be considered an indicium of indirect communication. In *Schmitt,* for example, a mailing list that mysteriously found its way into the possession of one of the defendant committees was later discovered to have been rented from an organization started by candidate Reagan and his aides.[67]

d. Membership— Longstanding friendships and working relationships are a primary means for achieving clandestine coordination. Prior collaborations[68] with any authorized committee[69] of the candidate — in past as well as present election years — by an individual currently working for or advising an "independent" political committee suggest a lack of independence. The same holds true for expenditures made by an individual on his own who has worked for an authorized committee of the candidate in a prior campaign. Similarly, if a former staff member of the official campaign makes substantial expenditures, the circumstances on their face indicate that the expenditures are be-

64. FEC General Counsel's Report in the Matter of ACU/CVF 5-6 (Nov. 11, 1977).

65. 11 C.F.R. § 109.1(5)(d)(1) (1981).

66. In the situation discussed *supra* at note 52 and accompanying text, the circumstances indicated that the official Reagan campaign fully intended to lease the mailing list to an array of conservative groups. Had the official campaign been able to demonstrate that they knew nothing about the whereabouts of the mailing list, a presumption of coordination would have been successfully rebutted, *see infra* notes 79-84 and accompanying text.

67. *See supra* note 52.

68. The term "prior collaborations" should be interpreted broadly to include any former ties with an authorized campaign. The fact that an individual was not an officer of the authorized committee, or did not receive compensation from the candidate, should not preclude the trier of fact from considering the individual's former ties with the campaign. *Cf. supra* note 43 and accompanying text (discussing the shortcomings of the FEC's definition of coordination in 11 C.F.R. 109.1(b)(4)(i)(B) (1981)).

69. The term "authorized committee" includes the official national committee of the candidate's party.

ing made "based on information provided by the candidate."[70]

It may be difficult, however, to prevent political committee members from talking informally with former members of authorized campaigns or close friends of the candidate.[71] Under this aspect of the proposed test, vexing problems arise in determining whether a PAC has engaged in coordination by consulting former colleagues on an ex-officio basis. An inability to prevent all potential coordination, however, does not justify foresaking remedial measures altogether.

e. Size of expenditure and organization— Before coordination can occur, the candidate must be aware of the activities planned by the spender on behalf of the campaign. It is highly unlikely that a shrewd candidate will not take careful notice of a PAC or individual offering large financial resources to support the official campaign. Thus, because large expenditures increase the likelihood that the contacts needed to establish coordination have occurred, they can be taken as indicative of indirect communication.[72]

The *Schmitt* case presents an obvious example of size influencing the potential for coordination. The five defendant political committees in *Schmitt* had pledged to raise $57 million for expenditures on behalf of the Reagan campaign.[73] After the Re-

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70. *See* 11 C.F.R. § 109.1(b)(4)(i) (1981). In a 1976 advisory opinion, the FEC ruled that a volunteer worker in Gerald Ford's presidential primary campaign could not leave the campaign to form a political committee to make "independent expenditures": "In the view of a majority of the Commissioners, contacts with campaign personnel and receiving information and knowledge of campaign plans or needs, were inevitable." Response to Opinion Request No. 777 (FEC Dec. 7, 1976). Thus, the Commission concluded that the presumption of coordination could not be rebutted.

71. *See* Clagett & Bolton, *supra* note 34, at 1361-62 (arguing that candidates and campaign officials should be protected by the first amendment from government regulations which restrict their ability to enunciate campaign strategies at press conferences and informally with friends).

72. This criterion precludes the candidate from denying coordination on the grounds of "ignorance of the spender's activities," unless he can come forward with evidence supporting his position.

73. Americans for Change intended to raise between $20 and 30 million through nationwide solicitations of contributions in order to purchase large amounts of radio and television time for the purpose of running professionally prepared advertisements. Wash. Post, June 6, 1980, at A1, col. 2; Balt. Sun, June 6, 1980, at A4, col. 1. Americans for an Effective Presidency intended to raise $3 to 8 million for similar purposes. Hornblower, *Gold-Plated Panel Set to Raise, Spend Millions For Reagan*, Wash. Post, July 10, 1980, at A3, col. 1. The third committee, Fund for a Conservative Majority, expected to raise between $3 and 10 million for advertising. Wash. Star, June 2, 1980, at A1, col. 1. The North Carolina Congressional Club sought to raise up to $4 million for the purchase of radio and television time. N.Y. Times, July 15, 1980, at B9, col. 2. The National Conservative Political Action Committee intended to raise between $1 and 5 million for the purpose of running advertisements opposing President Carter and supporting candidate Reagan. *Id.*

publican National Convention, candidate Reagan opted to receive $29.4 million in public financing for his general election campaign, thereby incurring the legal obligation to limit his campaign expenditures to the amount of the grant.[74] Given this limitation, the combined expenditures by the five committees sued in *Schmitt* represented 158% of the Reagan budget. The extraordinary financial clout of these committees relative to the official Reagan campaign increased the likelihood that the campaign carefully monitored their activities and encouraged coordination whenever possible.[75]

f. Content of campaign literature— The content of campaign literature distributed by a PAC can be a useful indication of intent to circumvent contribution limits. In *Schmitt,* for example, one of the defendant committees disseminated brochures making its intentions plain: "Although Ronald Reagan will be limited in spending this fall by federal law, you and I can help him overcome the odds — [We] can spend an unlimited amount of money on [his behalf]."[76] Nevertheless, it is difficult to infer from the content of the literature whether coordination has actually occurred. Written or spoken intentions therefore should only be considered as suggestive of coordination; taken alone they count for little when no other evidence exists that coordina-

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The five committees did not succeed, however, in raising the full amount they expected. Actual independent expenditures by all PAC's in 1980 were far less than $57 million. *See supra* note 10.

74. *See* 26 U.S.C. § 9012(f) (1976).

75. Similarly, the Grassley senatorial campaign in Iowa was well aware of the effectiveness of PAC expenditures. *See supra* note 53.

76. FEC exhibit 17 to the Commission's rule 1-9(h) Statement, filed with the three-judge court in Federal Election Commission v. Americans for Change, No. 80-1754 (D.D.C. filed Aug. 4, 1980) (on file with the *Journal of Law Reform*). Americans for Change distributed literature stating: "The federal law prohibits you from contributing directly to the Reagan general election campaign and limits the amount of funds that he can spend on voter educational material." FEC exhibit 4 to the Commission's rule 1-9(h) Statement, *supra* (on file with the *Journal of Law Reform*).

> Reagan for President in '80' is being sponsored by Americans For Change, because federal campaign financing laws prohibit national candidates from accepting personal contributions since they receive federal funds. If you want to see a change in this nation in 1980 it's going to take much more than the $29 million that the federal government is allowing Ronald Reagan.

FEC exhibit 2 to the Commission's rule 1-9(h) Statement, *supra* (on file with the *Journal of Law Reform*).

The literature also indicated that the Reagan campaign was well aware that the committees were engaged in shadow campaigns on its behalf. In one instance, the National Conservative Political Action Committee urged contributors to inform the official Reagan campaign of their support: "If you can send a contribution to NCPAC to help us help Governor Reagan, I am also asking you to send him the enclosed postcard telling him of your support." FEC Exhibit 21 to the Commission's rule 1-9(h) Statement, *supra* (on file with the *Journal of Law Reform*).

tion has actually occurred.

g. Use of the candidate's name— In several instances, political committees have attempted to benefit from the aura of legitimacy created by adopting the candidate's name.[77] An official campaign that fails to disavow this use of the candidate's name has conferred special status upon the spender, and thus would be likely to monitor that spender's activities. As with a PAC offering sizeable financial backing to a campaign, the initial groundwork needed to establish coordination may well have occurred where a committee is authorized to use the candidate's name.[78]

2. Applying the seven-part test— Each factor of the proposed test should not be accorded equal weight when determining whether coordination has occurred. Any one of the first three criteria — concerned with indirect communication between spender and candidate through the media, political consultants common to both the spender and the campaign, and material furnished to the contributor by the candidate — should be sufficient to establish a "rebuttable presumption of fact"[79] that the candidate and the spender have engaged in coordinated activity. Presentation of evidence tending to prove any one of these fac-

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77. Several of the political committees made use of the candidate's name to create the appearance that their activities were authorized by the official campaign. *See* FEC Exhibits 2, 10 & 18 to the Commission's rule 1-9(h) Statement, *supra* note 76 (on file with the *Journal of Law Reform*). It is likely that the official Reagan campaign would watch carefully over any organization which appropriated its name. The potential for harm to a campaign from an irresponsible group is considerable; a campaign's decision not to disavow PAC activities suggests that it has concluded the PAC is beneficial to the overall effort.

As a general matter, disavowal of intent or knowledge of prearrangement is not a formal element of the proposed test. Few candidates will refuse to disavow knowledge. Requiring disavowal, therefore, has little probative value. Nevertheless, a failure by the official campaign to make a public disavowal if requested to do so could be used to support a finding of coordination. Discouraging the use of official names, however, may have undesirable consequences. *See* Adamany, *supra* note 35, at 601-02 (arguing that PAC's frequently use *unrevealing* names — e.g., "Citizens for Good Government" — in order to disguise the true origins of independent expenditures).

78. *See supra* note 77. Both Congress and the FEC have recognized that use of the candidate's name indicates that the organization using it is one that the candidate has authorized. *See* H.R. REP. No. 422, 96th Cong., 1st Sess. 3, *reprinted in* 1979 U.S. CODE CONG. & AD. NEWS 2860, 2873; Memorandum of Points and Authorities in support of Plaintiff's Motion for Summary Judgment, at 19 n.21, Federal Election Commission v. Americans for Change, No. 80-1754 (D.D.C. filed Aug. 4, 1980); *see also* 2 U.S.C. § 432(e)(4) (Supp. IV 1980).

79. *See* F. JAMES & G. HAZARD, CIVIL PROCEDURE § 7.9 (2d ed. 1977). "Rebuttable presumptions of fact" are to be distinguished from "conclusive presumptions." A "rebuttable presumption" is a procedural device for allocating the production burden. *Id.* § 7.9, at 256. "The conclusive presumption is not really a procedural device at all. Rather it is a process of concealing by fiction a change in the substantive law." *Id.* § 7.9, at 253.

tors renders the likelihood of prearranged expenditures so great that it is "sensible and time-saving" to presume that coordination exists unless the individual spender or PAC proves otherwise.[80] The rebuttable presumption does not shift the ultimate burden of persuasion to the independent advocate; it merely shifts the burden of coming forward with probative evidence. Once parties present evidence to rebut the charge of coordinated activity, the presumption disappears and has no further effect on the outcome.[81] If, however, the PAC or individual spender fails to meet the burden of production, coordination will be established conclusively.[82] No amount of evidence tending to disprove the existence of any of the other six factors will alter this conclusion.

The remaining four criteria — focusing on the membership of the PAC, the level of expenditures, the content of a committee's campaign literature, and the use of the candidate's name — are of lesser importance and should not be held sufficient to create a rebuttable presumption of coordination. Each of these factors considered singly could reasonably reflect the typical operations of a PAC or individual spender. Thus, to avoid finding coordination where the pattern of activity reflects mere unintended parallelism and not prearrangement, these lesser factors should be considered insufficient to establish a presumption of coordination. Evidence tending to prove a combination of these factors, however, may be indicative of a general intent to coordinate. In this instance, it remains for the trier of fact to assess the totality of the evidence before reaching a conclusion.[83]

Dividing the seven factors into presumptive and non-presumptive categories will not unfairly condemn the well-intentioned spender who, as a matter of coincidence, appears on the basis of one or two factors to have engaged in coordination. If the coincidental activities fall within the category of factors not accorded presumptive weight because they are more common to

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80. *See* MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 343, at 807 (E. Cleary 2d ed. 1972) ("Most presumptions have come into existence primarily because the judges have believed that proof of fact B renders the inference of the existence of fact A so probable that it is sensible and time-saving to assume the truth of fact A until the adversary disproves it."). McCormick gives two additional reasons for the creation of presumptions: "to correct an imbalance resulting from one party's superior access to the proof" and "to avoid an impasse, to reach some result." *Id.* § 343, at 806-07.

81. F. JAMES & G. HAZARD, *supra* note 79, § 7.9, at 258. The orthodox view holds that once rebutting evidence has been submitted "the presumption is utterly destroyed and disappears . . . even though the trier disbelieves the countervailing evidence." *Id.*

82. *See id.*

83. Where the lesser factors are involved, the trier of fact is deliberately given broad discretion to weigh all the circumstances surrounding the expenditure.

the daily operations of a PAC or independent spender, the trier of fact will have considerable discretion to weigh all the available evidence. Furthermore, even if the spender's conduct is not typical of independent activity and thus establishes a presumption of prearrangement, the spender retains the opportunity to come forward with evidence rebutting charges of a general intent to coordinate.[84]

II. A LEGISLATIVE SOLUTION TO THE COORDINATION PROBLEM

Careful application of the proposed seven-part test will improve enforcement of the *Buckley* standards, but cannot root out all vestiges of indirect coordination. No matter how carefully the relevant factors are weighed, case-by-case analysis under *Buckley* will nonetheless permit some clandestine coordination to go undetected.[85] This section of the Note, therefore, takes a different approach to the coordination problem: as a supplement

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84. Some proponents of campaign finance reform argue that PAC expenditures should be limited even if there is no evidence that coordination has occurred. The issue of whether PAC's are inherently incapable of making a truly independent expenditure lay at the heart of the challenge which an evenly divided Supreme Court failed to decide in *Schmitt*. *See* 50 U.S.L.W. 4168 (U.S. Jan. 19, 1982) (No. 80-847) (per curiam), *aff'g by an equally divided court* 512 F. Supp. 489 (D.D.C. 1980) (three-judge court). The effect of the Court's ruling was to affirm the holding of the lower court that limits on independent expenditures by PAC's are unconstitutional. This Note does not attempt to address the issue fully, although it suggests that the background to *Schmitt*, *see supra* notes 45-56 and accompanying text, indicates a prophylactic rule limiting PAC expenditures in certain areas may be necessary. *See infra* pt. II.

Regardless of how the Court ultimately resolves a *Schmitt*-type challenge to contribution regulations, the holding will be limited to PAC expenditures in publicly financed presidential election campaigns. Therefore, even if limits on PAC contributions were held constitutional, the criteria proposed in this Note would be applicable to a variety of contexts where the coordination problems raised by *Buckley* could arise: PAC spending in presidential primaries and congressional races, and individual expenditures in both presidential and congressional campaigns. *Cf.* J. CEASER, REFORMING THE REFORMS 76 (1982) (arguing that the impact of the independent expenditure loophole is greater for the nomination campaign than for the general election campaign because there is less free publicity in the primary campaign and thus added expenditures make a larger difference). Should the Court agree with the circuit court in *Schmitt* that limits on PAC spending in publicly financed presidential campaigns are unconstitutional, however, there clearly would be an urgent need to improve the definition of "coordination" in a manner consonant with the *Buckley* guidelines. For general discussion of the constitutionality of PAC spending limits, see Note, *The Constitutionality of Regulating Independent Expenditure Committees in Publicly Funded Presidential Campaigns*, 18 HARV. J. ON LEGIS. 679 (1981); Comment, *Independent Political Committees and the Federal Election Laws*, 129 U. PA. L. REV. 955 (1981).

85. *See e.g.*, *supra* note 70 and accompanying text. It is difficult, for instance, to regulate informal socializing between independent spenders and members of the official campaign staff. *See* Clagett & Bolton, *supra* note 34, at 1361-62.

to the seven-part test, it suggests prophylactic legislation designed to regulate the activities of independent advocates in one area of the electoral forum.

The proposed legislation attempts to equalize access to political advertising time on television and radio. This focus on the electronic media is warranted because the probability of coordination is particularly great where the broadcast media are involved. By equalizing access to the electronic media, the proposed legislation attacks the source of the coordination problem in an area of the electoral forum where prearranged activities are most likely to occur. As a general matter, clandestine coordination increases in proportion to the influence wielded by a PAC or individual spender.[86] The wealthier and more powerful the spender, the greater the candidate's incentive to exploit the spender's resources. Such exploitation, in turn, induces coordination between candidate and spender. This pattern is reflected most dramatically with regard to spending for radio and television time; the high cost[87] and effectiveness[88] of electronic media advertising, coupled with its generally pervasive use as a cam-

86. There are two reasons for the cause and effect relationship between undue influence and coordination. First, an independent advocate who controls sizable amounts of broadcast time is more likely to command the attention of the candidate. *See supra* notes 70-74 and accompanying text. It is inconceivable that a shrewd candidate will not take careful stock of a PAC or individual influential in shaping public opinion. Second, an advocate who dominates the media has great value to a candidate. By coordinating activities with the advocate, the candidate can turn a large block of broadcast time to his own best advantage. The candidate will have great incentive to transform the independent activities of a powerful advocate into a "shadow campaign." Indeed, the very fact that the independent spender can command so much broadcast time means the candidate cannot afford to have the wrong message presented to the public. The authorized committee will be sorely tempted to work with the advocate to ensure that the "independent" campaign does not focus on issues which could cause a blacklash vote.

87. *See* H. ALEXANDER, FINANCING THE 1976 ELECTION 458 (1979) (noting that in the 1976 election one minute of prime-time advertising on a national network cost as much as $120,000).

88. *See id.* at 373 (arguing that "[t]he strict limitations on campaign spending greatly enhanced the importance of broadcast advertising, particularly television, which was considered to be the most efficient method of reaching large numbers of voters"); Patterson & McClure, *Television and the Less-Interested Voter: The Costs of an Informed Electorate*, 425 ANNALS 88 (1976) (contending that while television news has little effect on the disinterested voter, high-cost televised political advertisements are extremely successful in reaching all voters); Wick, *The Federal Election Campaign Act of 1971 and Political Broadcast Reform*, 22 DE PAUL L. REV. 582, 582-83 (1973). The critical importance of electronic media advertising to the overall campaign is reflected in the percentage of the campaign budget spent on television and radio advertising: in 1976, 34% of the Democratic Party budget and 53% of the Republican Party budget was devoted to electronic media advertising. *See* H. ALEXANDER, FINANCING THE 1976 ELECTION 373, 411 (1979).

paign tool,[89] has made those PAC's and individuals capable of purchasing sizable amounts of airtime and dominating the media particularly susceptible to exploitation.[90] Thus, while it cannot solve all aspects of the coordination problem, legislation designed to mitigate imbalances in the purchase of political advertising time will help to lessen significantly the incentive to coordinate indirectly.

Moreover, accepting the need for prophylactic legislation, a stronger constitutional argument can be made for regulating the activities of independent spenders if the legislation is confined to the purchase of political advertising time on television and radio. Although the *Buckley* Court rejected the use of prophylactic legislation to limit independent activity in candidate campaigns, it specifically limited its holding to cases not involving the broadcast media.[91]

A. The Red Lion *Doctrine*

The Supreme Court has frowned on the use of government restrictions to equalize voices in the public forum. In *Buckley*, the Court flatly rejected the notion that government can limit "the speech of some elements of our society in order to enhance the relative voice of others,"[92] finding such a concept "wholly foreign to the First Amendment."[93] A separate series of cases, however,

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89. *See* Wick, *supra* note 88, at 585 (noting that the high cost of television campaigning is detrimental because it results in successful candidates owing political debts to their backers which "can be paid off only at the expense of the public").

90. *See supra* note 88. If an official campaign successfully coordinated purchases of television and radio advertising time with a PAC, that portion of the campaign budget which would have been spent for electronic media advertising would be freed for making additional purchases of broadcast time or for use elsewhere.

91. *See infra* notes 92-95 and accompanying text.

92. 424 U.S. at 48-49. The Court reasoned further that expenditure limits did not advance the first amendment ideal of securing " 'the widest possible dissemination of information from diverse and antagonistic sources,' [and the] 'unfettered interchange of ideas for the bringing about of political and social changes desired by the people.' " *Id.* at 49 (quoting New York Times v. Sullivan, 376 U.S. 254, 266, 269 (1964); Roth v. United States, 354 U.S. 476, 484 (1957); Associated Press v. United States, 326 U.S. 1, 20 (1945)); *see also Buckley*, 424 U.S. at 49 ("The First Amendment's protection against governmental abridgement of free expression cannot properly be made to depend on a person's financial ability to engage in public discussion."). *See generally* Nicholson, *supra* note 34, at 331-33 (stressing the Burger Court's refusal to concern itself with wealth discrimination).

93. 424 U.S. at 49. The "equalization rationale" was one of three arguments advanced by the respondents in *Buckley* to justify contribution and expenditure limits. The second rationale for limiting campaign spending — preventing corruption, real or perceived, in the electoral process — was found to be a compelling government interest which justified restraints on first amendment activity. In contrast, the Court refused to accept as com-

based on *Red Lion Broadcasting Co. v. FCC*,[94] suggests that the Court will give weight to an "equalization rationale" if broadcast media are involved.[95]

In *Red Lion*, the Supreme Court upheld the FCC's fairness doctrine[96] and personal attack rules[97] against first amendment challenges brought by broadcasters. Emphasizing the scarcity of television and radio frequencies as a justification for congressional regulation,[98] the Court reasoned that although broadcast-

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pelling the government interest in controlling the skyrocketing cost of campaign financing. *Id.* at 29.

Some commentators have characterized the Supreme Court's rejection of the equalization rationale as poorly reasoned and unsupported by precedent. The two opinions upon which the Court relied primarily, Mills v. Alabama, 384 U.S. 214 (1966), and Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974), held only that the equality principle cannot override first amendment protections afforded to the press. *See* Leventhal, *supra* note 35, at 369. For a different but related critique of the *Buckley* approach, see Adamany, *supra* note 35, at 586 n.135 (arguing that the Court's logic in distinguishing actual and apparent corruption confuses its own rationale in the absence of a full congressional record of corruption). *See generally supra* note 35.

94. 395 U.S. 367 (1969). For general discussion of the background to *Red Lion*, see Barrow, *The Equal Opportunities and Fairness Doctrines in Broadcasting: Pillars in the Forum of Democracy*, 37 U. CIN. L. REV. 447 (1968); Robinson, *The FCC and the First Amendment: Observations on 40 Years of Radio and Television Regulation*, 52 MINN. L. REV. 67 (1967).

95. The *Buckley* Court expressly limited its discussion of the equalization rationale so as not to include *Red Lion*. *"Red Lion* 'makes clear that the broadcast media pose unique and special problems not present in the traditional free speech case'. . . ." 424 U.S. at 49 n.55 (quoting CBS, Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 101 (1973); *Red Lion*, 395 U.S. at 388).

96. Under the fairness doctrine, a broadcaster has an affirmative obligation to present contrasting views on all controversial issues concerning the public interest. Political Broadcast Primer, 69 F.C.C.2d 2209, 2226 (1978). The fairness doctrine requires only that the broadcaster offer "a reasonable balance" in its programming; the doctrine does not require the broadcaster to provide representatives of opposing viewpoints equal time. Depending on the circumstances of an individual case, one-third, one-fifth, or one-seventh time may satisfy the "reasonable balance" standard.

97. The personal attack rules require a broadcaster to give "reasonable" response time to any individual who is the subject of an attack upon his "honesty, character, integrity or like personal qualities" during the presentation of views "on a controversial public issue" by any person over the licensee's station. *Id.* at 2225.

98. In *Red Lion* and CBS, Inc. v. Democratic Nat'l Comm., 412 U.S. 94 (1973), the Court clearly differentiated broadcast from print media: "differences in the characteristics of news media justify differences in the First Amendment standards applied to them." *Red Lion*, 395 U.S. at 386. "[B]roadcast media pose unique and special problems not present in the traditional free speech case . . . . [B]roadcasting is subject to an inherent physical limitation." *CBS, Inc.*, 412 U.S. at 101.

Scarcity in the broadcast medium distinguishes the Court's ruling in Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974). There, the Court held that a Florida statute granting a limited right of reply to candidates attacked in newspapers violated the first amendment.

Critics of the fairness doctrine argue that the advent of cable television renders this distinction moot. *See generally* Simmons, *The Fairness Doctrine and Cable TV*, 11 HARV. J. ON LEGIS. 629 (1974) (arguing that the abundance of channels provided by cable

ers are licensed to use the airwaves, their role as a "proxy or fiduciary" for the community requires them to serve the public interest: "It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount."[99] By preserving "an uninhibited marketplace of ideas in which truth will ultimately prevail,"[100] broadcast regulations serve a compelling government interest which outweighs broadcasters' claims of infringement on first amendment rights.[101]

Through statutory amendments and federal rules, Congress and the FCC have tailored media-access rights to conform with the guidelines set forth in *Red Lion*. Section 315(a) of the Communications Act of 1934 requires a broadcaster who has sold time to one candidate for federal office to offer "equal opportu-

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television undercuts the scarcity argument used by the *Red Lion* Court to support the fairness doctrine). This reliance on cable television, however, is vulnerable on two grounds. First, it is not clear that the new technology will reach a majority of viewers. Second, there is no assurance that the same few broadcasters who control access to the three commercial stations will not also purchase the rights to cable. For a discussion of electronic and print media access, see Bollinger, *Freedom of the Press and Public Access: Toward a Theory of Partial Regulation of the Mass Media*, 75 MICH. L. REV. 1 (1976).

99. 395 U.S. at 390.

100. *Id.* (citing New York Times v. Sullivan, 376 U.S. 254, 270 (1964); Associated Press v. United States, 326 U.S. 1, 20 (1945); Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting)).

101. In a recent decision, CBS, Inc. v. FCC, 101 S. Ct. 2813 (1981), the Supreme Court reaffirmed *Red Lion*, holding that it was constitutional for the FCC to revoke the license of a broadcasting station for willful or repeated failure to allow reasonable access to the station by a legally qualified candidate for federal elective office. The Court concluded that the FCC's practice of independently determining whether "reasonable access" had been granted did not impair the broadcaster's editorial discretion. *Id.* at 2827. The Court reaffirmed that the broadcaster's role as public trustee " 'is burdened by enforceable public obligations'," *id.* at 2829 (quoting Office of Communication of the United Church of Christ v. FCC, 359 F.2d 994, 1003 (D.C. Cir. 1966)), including the right of the government to require " 'a licensee to share his frequency with others'," 101 S. Ct. at 2829 (quoting *Red Lion*, 395 U.S. at 389). The Court also reiterated the essential premise of *Red Lion* that the first amendment rights of the viewers and listeners, not the broadcasters, are "paramount." 101 S.Ct. at 2829. The Court noted that " 'it is of particular importance that candidates have the . . . opportunity to make their views known so that the electorate may intelligently evaluate the candidates' personal qualities and their positions on vital public issues before choosing among them on election day'." *Id.* at 2830 (quoting *Buckley*, 424 U.S. at 52-53).

Prior to CBS, Inc. v. FCC, the Court appeared to retreat from *Red Lion* in CBS, Inc. v. Democratic Nat'l Comm., 412 U.S. 94 (1973), ruling that it was not unconstitutional for a broadcaster to refuse to sell editorial advertising time. The Court, however, stressed that its holding was not intended to overturn the fairness doctrine. *See id.* at 127. The decision stemmed largely from the Court's concern that the remedy sought by the plaintiff Democratic National Committee was a broad right of access that inevitably would involve the government too deeply in the activities of broadcasters. *Id.* at 130-32. The majority noted that should the FCC or Congress at some future date devise "some kind of limited right of access that is both practicable and desirable," the Court might be inclined to rule differently. *Id.* at 131.

nities" to others running for the same office.[102] "Equal opportunities" is a strict standard, requiring the broadcaster to provide, upon request, an equal amount of time at the same cost and during an equivalent time period.[103] While section 315(a) applies only to federal candidate appearances, the FCC has extended the "equal opportunities" principle to broadcasters who sell time to spokesmen or supporters of a candidate, including independent spenders.[104] The strict mandate of "equal opportunities" does not, however, require a broadcaster selling time to support-

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102. The statute provides:

> If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station: *Provided*, . . . [n]o obligation is imposed under this subsection upon any licensee to allow the use of its station by any such candidate . . . . Nothing in the foregoing . . . shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this chapter to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.

47 U.S.C. § 315(a) (1976). Section 315(a) requires only that "equal opportunities" be given to a federal candidate appearing in person. *See generally* CBS, Inc. v. FCC, 101 S. Ct. 2813 (1981).

103. The time of day is more important than the length of the time period in determining the effectiveness of the response. A prime-time audience is far larger than that which could be reached during off-peak hours. Thus, two minutes of prime time might be the equivalent of thirty minutes late at night. "Equal time," therefore, does not necessarily require precisely the same length of time.

104. *See* Nicholas Zapple, 23 F.C.C.2d 707 (1970). The extension of § 315(a) to include supporters of a candidate is commonly termed the *Zapple* doctrine. The FCC insists it has not extended the scope of § 315(a), but merely is "appl[ying] the fairness doctrine in a special way so that it becomes much the same as 'equal opportunities'." Political Broadcast Primer, 69 F.C.C.2d 2209, 2226 (1978). The Supreme Court in *Red Lion* recognized that if the fairness doctrine were not applied to candidates' supporters, circumvention of the provision would result:

> The [equal opportunities] section applies only to campaign appearances by candidates, and not by family, friends, campaign managers, or other *supporters*. Without the fairness doctrine, then, a licensee could ban all campaign appearances by candidates themselves from the air and proceed to deliver over his station entirely to the supporters of one slate of candidates, to the exclusion of all others. In this way the broadcaster could have a far greater impact on the favored candidacy than he could by simply allowing a spot appearance by the candidate himself.

395 U.S. at 382-83 (emphasis added) (footnote omitted). The Court reasoned that applying the general principles of the fairness doctrine would prevent circumvention. The FCC has in effect acted on the Court's suggestion.

The *Zapple* doctrine, however, only applies when an initial sale has already been made voluntarily to one group of supporters. A broadcaster is free to deny access to all supporters if he chooses. *See generally Zapple*, 23 F.C.C.2d 707 (1970). *But cf.* CBS, Inc. v. FCC, 101 S. Ct. 2813 (1981) (federal candidates must have reasonable access even if an initial sale has not been made to an opposing candidate).

ers of one candidate to provide free time to backers of a competing candidate who are unable to pay for the broadcast.[105]

A major problem with the law as it presently stands is its failure to extend "equal opportunities" to situations where spokesmen or supporters of a candidate cannot raise the funds to broadcast a response to an official campaign advertisement. Offering to sell radio or television time does little to further the policy goals behind the "equal opportunities" standard if the supporters of a candidate lack the resources to purchase that time.[106] In many instances, it is unlikely that spokesmen for a given candidate will be able to match the sums which powerful,

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105. Under the *Cullman* doctrine (a corollary of the fairness doctrine), a broadcaster is required to offer responsible spokesmen free time if no alternative means exists of providing balance on a controversial issue. Cullman Broadcasting Co., 40 F.C.C. 576 (1963). In *Cullman*, the FCC stated:

> [I]t is clear that the public's paramount right to hear opposing views on controversial issues of public importance cannot be nullified by . . . the inability of the licensee to obtain paid sponsorship of the broadcast time . . . . [The broadcaster] cannot reject a presentation otherwise suitable to the licensee — *and thus leave the public uninformed* — on the ground that he cannot obtain paid sponsorship for that presentation.

Id. at 577 (emphasis added). Broadcasters have objected to the *Cullman* doctrine on the ground that citizen groups tend to spend their money on nonbroadcast media and use *Cullman* to obtain free radio and television time. *See* R. MASTRO, D. COSTLAW & H. SANCHEZ, TAKING THE INITIATIVE: CORPORATE CONTROL OF THE REFERENDUM PROCESS AND WHAT TO DO ABOUT IT 27 (Media Access Project 1980); *cf.* Fairness Report, 48 F.C.C.2d 1, 32 (1974) (noting the objections of some parties to the *Cullman* principle). Nevertheless, the FCC has stood by the *Cullman* doctrine, holding that "it is more important . . . that the public have an opportunity to receive contrasting views . . . than that the *Cullman* principle be abandoned because of the possible practices of a few parties." *Id.* at 33.

Section 315(a), however, does not require adherence to the *Cullman* doctrine. In Nicholas Zapple, 23 F.C.C.2d 707 (1970), the FCC concluded that as a "general proposition" the public's right to know should not be defeated by the lack of paid sponsorship, but observed that this proposition should "not have applicability in the direct political arena." *Id.* at 708. The Commission reasoned that requiring broadcasters to subsidize purchases of airtime by an official campaign or its supporters would constitute an "unwarranted intrusion" of the fairness doctrine into campaign financing. *Id.* at 708.

106. For discussion of the policy goals underlying *Red Lion*, see *supra* notes 98-101 and accompanying text. Given that the *Red Lion* Court upheld the policy rationales underlying both the fairness doctrine and § 315(a) of the Federal Communications Act of 1934, *see supra* notes 98-101 and accompanying text, it is surprising that the FCC has chosen to apply the *Cullman* doctrine only to the former.

The campaign laws as structured present two additional problems related to the issue of whether supporters of a candidate are truly given "equal opportunity" to respond to expenditures made by supporters of another candidate. First, the laws fail to extend "equal opportunities" to candidates who cannot afford to buy time in response to television appearances by an opposing candidate. Second, the laws provide "equal opportunities" only to supporters of a "victimized" candidate — and not to the candidate himself — if the initial purchase of advertising time was by supporters of the opposing candidate. *See* Nicholas Zapple, 23 F.C.C.2d 707 (1970). These shortcomings, however, are not related to the specific problem of coordination between candidates and independent spenders, and thus lie outside the scope of this Note.

well-organized national PAC's pour into television advertising.[107] In short, by failing to provide free response time, section 315(a) is an ineffective guarantor of "equal opportunities."

This failure to provide free time has permitted wealthy independent spenders to gain undue influence in candidate campaigns, thus increasing the likelihood for indirect coordination between spender and candidate. One way to lessen the impetus for coordination, therefore, would be to amend existing political broadcast law to guarantee spokesmen and supporters of all candidates free equal-response time. The proposed legislation should require a broadcaster to provide supporters of a candidate for federal office with free, equal-response time — if they cannot finance a response — whenever air time has been sold to an individual or committee making an independent expenditure against that candidate.[108]

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107. In 1978, total PAC expenditures reached $77.8 million. Adamany, *supra* note 35, at 588. Experts predict that the potential for PAC expansion in the business sector remains enormous. *Id.* at 589. Given the untapped potential of *Fortune*-500 businesses, *id.*, it is difficult to imagine a spokesman for a candidate matching the collective financial strength of well-organized PAC's. Although independent expenditures constituted only a small portion of total PAC expenditures made during the 1980 campaign, *see supra* note 10, the $77.8 million figure reflects the commitment businesses have made — and likely will continue to make — to finance electoral politics.

The potential for expansion of PAC spending far exceeds any potential increase in campaign costs; indeed most presidential candidates elect to receive federal election funding, which carries a legally imposed limit on spending. Even those candidates with wealthy backers, such as Ronald Reagan in 1980, choose to receive federal funding.

108. Supporters of a candidate who could afford to purchase time would still be required to do so, and a showing of need would be required before any awards of free time would be given. If, for example, a spender could afford to purchase only one-fourth of the response time, the broadcaster would be required to make up the difference between the spender's resources and equal time.

It is best left to Congress to establish precise eligibility criteria for determining which supporters qualify as needy. One way to ascertain eligibility, however, would be to examine the spender's "bank balance"; if paying for equal time would leave the supporter without operating funds, free time would be provided. A spender engaged in a national advertising campaign would not be required to deplete all its funds across the country before receiving free time to respond to advertisements broadcast in only one state. In this instance, the starting point for assessing the supporter's "bank balance" would be the percentage of its total funds corresponding to the state's relative electoral size. Furthermore, before a national supporter would be provided free time, local or other national PAC's supporting the candidate would have to be found incapable of purchasing advertising time. The FCC would be responsible for ensuring that the broadcaster properly administered a "needs" test, just as the Commission presently oversees administration of the fairness doctrine.

Free-time principles have been discussed previously by commentators. *See, e.g.*, Fleishman, *Freedom of Speech and Equality of Political Opportunity: The Constitutionality of the Federal Election Campaign Act of 1971*, 51 N.C.L. REV. 389, 480-81 (1973) (discussing a 1969 proposal for providing free time in federal elections); Nicholson, *Campaign Financing and Equal Protection*, 26 STAN. L. REV. 815, 852 (1974) (endorsing free time as constitutional). The uniqueness of this Note, however, lies in pro-

B. Constitutionality of the Free-Time Proposal

A free-time proposal raises two pressing constitutional issues. First, it is arguable that broadcast requirements infringe unconstitutionally upon the first amendment rights of broadcasters. Second, a free-time proposal may impinge unduly on the first amendment rights of individuals or committees wishing to make independent expenditures, because it may discourage broadcasters from accepting independent spenders' advertisements.

1. First amendment rights of broadcasters— The free-time proposal can be criticized on the grounds that requiring broadcasters to offer advertising time to opposing speakers who are unable to pay exceeds the permissible scope of restrictions on first amendment interests, as established in *Red Lion.* Under this view, Congress may regulate licensees to ensure a balanced debate of public issues over the airwaves, but it may not unduly circumscribe broadcasters' editorial discretion.[109] The Supreme Court has repeatedly held, however, that first amendment rights of political association and freedom of speech are not absolute. Government restrictions on the speech of a private person will be sustained if the government can show that the regulation is a "precisely drawn means of serving a compelling government interest."[110]

The proposed legislation survives the first part of this test; it furthers three government interests that the Court has found compelling. First, by ensuring that PAC's and wealthy individuals will not monopolize the debate, the free-time proposal — like

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posing a specific free-time measure as a remedy to the coordination problem.

109. This argument is similar to that made in CBS, Inc. v. FCC, 101 S. Ct. 2813, 2829 (1981).

110. Consolidated Edison Co. v. Public Service Comm'n, 447 U.S. 530, 540 (1980). A significant interference with protected first amendment rights "may be sustained if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgement." *Buckley,* 424 U.S. at 25. " 'The State may prevail only upon showing a subordinating interest which is compelling,' " First Nat'l Bank v. Bellotti, 435 U.S. 765, 786 (1978) (quoting Bates v. Little Rock, 361 U.S. 516, 524 (1960)), and "[e]ven then, the State must employ means 'closely drawn to avoid unnecessary abridgement.' " *Bellotti,* 435 U.S. at 786 (quoting *Buckley,* 424 U.S. at 25).

Cases involving television and radio provide no exception to this general principle. The Court has stated:

> Th[e] role of the Government as an 'overseer' and ultimate arbiter and guardian of the public interest and the role of the licensee as a journalistic 'free agent' call for a delicate balancing of competing interests . . . [requiring] both the regulators and the licensees to walk a 'tightrope' to preserve the First Amendment values written into the . . . Communications Act.

CBS, Inc. v. FCC, 101 S. Ct. 2813, 2829 (1981) (quoting CBS, Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 117 (1973)).

the fairness doctrine upheld in *Red Lion* — enlarges the scope of public debate.[111] Although requiring broadcasters to provide free response time could lead to higher advertising rates[112] and thus lessen "the volume of . . . coverage of public issues,"[113] the *Red Lion* Court was concerned less with increasing the sheer volume of speech than with expanding the diversity of views expressed.[114] By removing financial barriers for less wealthy supporters of federal candidates, the free-time proposal protects the breadth of the public debate.[115] A second government interest promoted by the proposed legislation is the furtherance of an informed public — a government interest found compelling in *CBS, Inc. v. FCC*.[116] Like the access provisions upheld in *CBS*, the free-time proposal "enhance[s] the ability of candidates to present, and the public to receive, information necessary for the effective operation of the democratic process."[117] Finally, by lessening the danger of coordination, the proposed legislation furthers a government interest recognized as compelling in *Buckley*: protection of the integrity of the electoral process.[118]

A free-time requirement would not impinge on first amend-

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111. "It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail . . . ." *Red Lion*, 395 U.S. at 390. "[T]he presumed effect of the fairness doctrine is one of 'enhancing the volume and quality of coverage' of public issues." *Buckley*, 424 U.S. at 49 n.55 (quoting *Red Lion*, 395 U.S. at 393).

112. The argument holds that requiring a grant of free time to parties victimized by independent spending campaigns will force broadcasters to double advertising rates to make up for lost revenue. As a result, independent advocates would be able to purchase less time.

113. *Buckley*, 424 U.S. at 49 n.55.

114. "It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here." 395 U.S. at 390; *see also supra* note 111; *supra* note 96 (purpose of fairness doctrine is to provide a "reasonable balance" of views).

115. Preserving the breadth of the public debate serves an additional and related government interest found compelling in *Red Lion*: protection against monopolization of the market of ideas by a private licensee. "It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas . . . rather than to countenance monopolization of that market . . . ." 395 U.S. at 390.

Nevertheless, it could be contended that the loss of revenue by the broadcaster constitutes a taking of property without due process of law, in violation of the fifth amendment, U.S. CONST. amend. 5. This argument, however, has been rejected by the Supreme Court on the ground that licensees of stations do not have a property interest in the channels. *See* FCC v. Sanders Bros. Radio Station, 309 U.S. 470, 475 (1940); *see also* Barrow, *supra* note 94, at 538 n.299. One proponent of free time has suggested that the lost-revenue problem can be avoided by providing government compensation through tax subsidies. *Id.* at 538-39.

116. 101 S.Ct. 2813 (1981).

117. *Id.* at 2830.

118. *See* 424 U.S. at 26-27.

ment rights of broadcasters to a greater degree than the Supreme Court has already permitted in other decisions. The proposed statute represents merely a logical extension to section 315(a) of the fairness principles upheld in *Red Lion*. Under the *Cullman* rule[119] — a corollary of the fairness doctrine — a broadcaster is required to offer responsible spokesmen free time if there is no other way to provide balanced debate on a controversial issue. Similarly, by providing free time to supporters of federal candidates who cannot afford response time, the proposed legislation ensures that fairness principles are fully applied to section 315(a).[120]

Indeed, not only is the proposed statute no more intrusive on first amendment rights than the statute upheld in *Red Lion*, but in one respect, it is less intrusive. The fairness doctrine requires the broadcaster to provide a balanced presentation of *all* controversial issues.[121] The free-time proposal, however, is more narrowly drawn, requiring a broadcaster to offer response time only when an independent expenditure has been made by an individual or a committee against a specific candidate.

Furthermore, the free-time statute intrudes less on the first amendment interests of broadcasters than the access provisions upheld in *CBS, Inc. v. FCC*.[122] The equal access statute at issue in *CBS* imposed on broadcasters an obligation to make reasonable amounts of time available for sale to all candidates in all campaigns, regardless of whether an opposing candidate purchased time.[123] The free-time proposal, in contrast, does not require that time be offered to all candidates; the broadcaster need only grant free time to the candidate who has been the target of the independent expenditure.

2. First amendment rights of independent spenders—

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119. *See supra* note 105.

120. *See* Barrow, *supra* note 94, at 530-39 (arguing that the original purpose of the equal opportunities doctrine, § 315(a), was to apply the fairness concept to political campaigns; thus expanding § 315(a) to provide free time would be consistent with congressional intent); *see also* N.Y. Times, Apr. 2, 1982, at 12, col. 5 (midw. ed.) (quoting the FCC Broadcast Bureau as advising the National Conservative Political Action Committee that "its advertisements, when broadcast outside campaign periods, may subject broadcasters to Fairness Doctrine obligations including, under the Cullman Doctrine, free response time if paid sponsorship is unavailable"). While the constitutionality of § 315(a) in its present form has never been challenged, the *Red Lion* Court implied that it stood on firm constitutional ground, equating it for purposes of "constitutional principle" with the fairness doctrine. 395 U.S. at 391; *see also* Barrow, *supra* note 94, at 530 (reasoning that the equal opportunities doctrine is constitutional).

121. *See supra* note 96.

122. 101 S. Ct. 2813 (1981).

123. *Id.* at 2823.

Awarding free time may have a chilling effect on the first amendment rights of independent spenders. A radio or television broadcaster will arguably be less likely to sell advertising time if it stands to lose equal amounts of time without compensation. A similar argument against regulation of the electronic media, however, has already been rejected by the Supreme Court. In *Red Lion*, the broadcasters contended that the fairness doctrine and personal attack rules would result in self-censorship and a diminution in the coverage of controversial public issues.[124] The Court responded that this result was "at best speculative,"[125] and observed that the FCC was fully empowered to enforce the doctrine if broadcasters refused to follow fairness principles.[126] The same response applies to the argument that a free-time proposal would limit first amendment opportunities for PAC's or other campaign spenders. No evidence exists that broadcasters would refuse to air advertisements paid for by independent spenders.[127] Moreover, if the FCC determined that the first amendment rights of independent spenders had been infringed, enforcement measures against broadcasters could be initiated.

It might be argued, however, that the potential loss of revenue for broadcasters distinguishes the free-time proposal from the fairness doctrine, because the danger of self-censorship is likely to be less "speculative"[128] where government regulation has the effect of diminishing income. Yet this distinction is flawed; under the *Cullman* corollary to the fairness doctrine, broadcasters also face a loss of revenue if responsible paying spokesmen cannot be found.[129] Moreover, even if the free-time proposal does tend to increase self-censorship of broadcasters, and thus

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124. *See* 395 U.S. at 392-93.

125. *Id.* at 393.

126. *See id.* at 393-94.

127. The FCC allows broadcasters to omit from their hourly commercial limits all political broadcasts which are not spot announcements. In addition, they may carry additional advertising when there is high political demand. Consequently, during a campaign, political advertising fills time that could not otherwise find commercial purchasers; in effect, the broadcaster receives a windfall profit. There is little reason to believe, therefore, that free time requirements would force a broadcaster to refuse time to an independent advocate.

In many instances, refusals to air advertisements have resulted from broadcasters' objections to content, rather than from financial considerations. Thus, a free-time statute may have no bearing upon a broadcaster's refusal to sell political advertising time. *See* Roberts, *Conservatives' Targets Battle Back*, N.Y. Times, Jan. 14, 1982, at A1b, col. 3 (11 of 25 stations approached by NCPAC in preparation for the 1982 elections refused to run their commercials for fear of being subject to libel actions).

128. *Red Lion*, 395 U.S. at 393.

129. *See supra* note 105.

encroach on first amendment rights of independent spenders, the legislation is justified by the compelling government interests discussed earlier.[130]

An additional constitutional objection to the proposed free-time legislation could be made on the grounds of overbreadth. The proposed statute, it might be argued, serves a compelling government interest,[131] but operates only by fashioning an overly broad prophylactic rule potentially affecting all independent spenders. The free-time proposal, however, survives the "least drastic means" test historically employed by the Court to determine whether a regulation constitutes a precisely drawn means of serving a compelling government interest.[132] The proposed legislation is carefully designed to regulate only one segment of the political forum — the electronic media. Independent spenders remain free to purchase unlimited advertising space in print media without worrying about their opponent receiving "reply time."[133] Furthermore, the free-time requirement would not restrict the amount of television or radio advertising time that the independent spender could purchase. Thus, a PAC or individual would not be prohibited from presenting its views through the electronic media to the public. Finally, the fact that the problems posed by indirect communication would necessitate a legislative solution in itself tends to discount the overbreadth argument; the adoption of prophylactic rules indicates that less drastic means for addressing the coordination problem — such as the *Buckley* test — have proved inadequate.[134]

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130. *See supra* notes 111-18 and accompanying text.

Arguably, independent spenders will be less inclined to purchase advertising time if they risk providing opponents with an equal amount of free time. *See* Nicholas Zapple, 23 F.C.C.2d 707, 708 (1970). Yet, an independent spender who decides not to purchase time in order to avoid "subsidizing" supporters of opposing candidates is merely exercising discretion on matters involving campaign strategy. It would be anomalous to find a chilling effect upon the first amendment rights of independent spenders where the only real effect of the regulations is to provide another party with an equal opportunity to speak.

131. *See supra* text accompanying note 118.

132. For discussion of overbreadth and "least drastic means," see W. LOCKHART, Y. KAMISAR & J. CHOPER, CONSTITUTIONAL LAW 730-38 (5th ed. 1980). *See generally* Shelton v. Tucker, 364 U.S. 479 (1960); Martin v. Struthers, 319 U.S. 141 (1943); Lovell v. Griffin, 303 U.S. 444 (1939).

133. *See* Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974) (holding a state statute granting candidates the right to respond to newspaper attacks violative of the first amendment).

134. Equalizing access is not the only way to ensure that wealthy independent spenders do not gain undue influence. A second possible solution would be to limit the amount of broadcast time that may be sold to supporters of a candidate.

The Court is likely to disallow a broad limit on all sales of broadcast time; the *Buckley* decision leaves little room for limits of any kind on individual independent expenditures

CONCLUSION

The *Buckley* Court's failure to define clearly the line separat-

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in a candidate campaign. Expenditures by corporate PAC's, however, may be a different matter. In First Nat'l Bank v. Bellotti, 435 U.S. 765 (1978), the Court found an outright ban on corporate contributions and expenditures in a ballot issue campaign to be an unconstitutional intrusion upon first amendment rights. Yet the Court noted carefully that "if appellee's arguments [had been] supported by record or legislative findings that corporate advocacy threatened imminently to undermine democratic processes," the outcome might have been reversed. *Id.* at 789-90. Thus, if it could be convincingly demonstrated that corporate advocacy was "drowning out" opposing viewpoints, limits on expenditures by corporations and corporate PAC's for purchase of political broadcast time might be found constitutional.

Since the *Bellotti* ruling in 1978, four new studies have indicated that corporate advocacy may indeed be "drowning out" the opposition. These studies suggest that an extraordinarily high correlation exists between corporate spending on grassroots lobbying and success at the polls in referenda campaigns for the corporate-backed side. Professor John Shockley was the first to make a systematic study of corporate spending. *See* J. Shockley, Corporate Spending in the Wake of the Bellotti Decision: National Implications (presented to the American Political Science Association Convention, New York City, 1978) (on file with the *Journal of Law Reform*). The first part of his study focused on spending levels and shifts in voter opinion in twelve nuclear power and bottle initiative campaigns. In at least 5 of the 12 referendum elections, early opinion polls showed substantial support for the measures, but on election day 9 of the 12 initiatives were defeated. *Id.* at 9. Shockley concluded that massive corporate expenditures had influenced, "if not bought," public opinion, and that the democratic process had been "managed, if not corrupted." *Id.* at 4. Corporate expenditures perverted the process in several ways. First, money determined which initiatives became controversial. Second, money permitted the corporate-backed side to define the issues and set the terms of the debate, which in turn frequently affected the quality of the debate. *Id.* at 5, 6, 11-12.

The second half of Shockley's study focused on a Colorado state tax-reform initiative. Shockley concluded that the measure was "a clear example of well-spent money completely turning around a tax reform package." *Id.* at 22. Polls indicated that corporate advertisements strongly influenced voter opinion. *Id.* at 13.

A second study, carried out by the Media Access Project ("MAP"), analyzed three Colorado initiative campaigns. *See* R. MASTRO, D. COSTLAW & H. SANCHEZ, *supra* note 105. In each of the campaigns, corporate opponents of the initiative outspent proponents by substantial margins. *Id.* at 8-10. The MAP researchers stressed that the most serious consequence of disparity in spending was the proponents' lack of access to the broadcast media. *Id.* at 14. Poll results showed that each of the initiatives held a commanding lead at the beginning of the campaign and subsequently lost the lead as the campaign progressed. *Id.* at 11. The MAP study concluded that a strong correlation existed between the amount and frequency of media coverage and victory at the polls. *Id.* at 15-16. The study shied away from concluding that spending and election outcome were causally related, but did emphasize that the triumphant side usually had the most money and the best media access.

Finally, two studies by the Council on Economic Priorities ("CEP") concluded that proponents of an under-financed ballot-issue campaign must rely on "favorable circumstances" or effective use of the FCC fairness doctrine if they are to prevail. *See* S. LYDENBERG, BANKROLLING BALLOTS: THE ROLE OF BUSINESS IN FINANCING STATE BALLOT QUESTION CAMPAIGNS (CEP Publ. R9-1, 1979); S. Lydenberg, Bankrolling Ballots—1980 Update: The Role of Business in Financing Ballot Question Campaigns (1980) (unpublished manuscript on file with the *Journal of Law Reform*). "Favorable circumstances" were defined by Lydenberg as a simple, straightforward ballot question, a previously ex-

ing independent expenditures from contributions has permitted circumvention of contribution limits through clandestine coordination. Without new guidelines for identifying both actual and effective coordination, or alternatively, without prophylactic legislation designed to strike at the root cause of coordination, campaign finance law cannot be properly enforced. Regardless which proposal is adopted, the FEC or Congress must act soon. A representative democracy will prosper only so long as the electorate retains faith in the system's ability to elect its leaders fairly. With each passing campaign a rising tide of independent expenditures threatens to erode that faith.

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isting grassroots organization, a well-publicized prior effort to achieve a similar measure through the legislative process, or effective use of the FCC fairness doctrine. *Id.* at 86. Financial dominance was found to coincide with a favorable outcome at the polls in 72% of the 34 ballot-issue campaigns examined. S. LYDENBERG, *supra*, at 1.

Taken together, these studies suggest that corporate advocacy meets the *Bellotti* test of "threatening imminently to undermine democratic processes." 435 U.S. at 790-91. While the *Bellotti* Court limited its holding to corporate spending in referenda campaigns, the conclusions which can be drawn from the studies may be applicable to candidate campaigns as well. The *Bellotti* Court was careful to note that Congress traditionally has recognized the need to provide candidate campaigns with a high degree of protection from the dangers of corruption. *See id.* at 788 n.26. Logically, then, if the studies can be used to show that corporate advocacy threatens the integrity of the electoral process in the context of a referenda campaign, they surely can be used to argue that corporate advocacy would pose a similar threat in the context of candidate campaigns.

An obvious problem with imposing absolute limits on campaign spending by corporate PAC's is the potential for circumvention. It would be possible for large corporate PAC's to split into smaller PAC's to avoid an expenditure limit. One answer might be to allow each corporation or labor union to register only one PAC with the FEC. Before purchasing broadcast time, the PAC would have to demonstrate that its funds were raised solely from within its own ranks. A second problem with imposing limits is that it may raise constitutional questions similar to those presented in *Schmitt, see supra* note 84. This proposal, however, differs from the statute at issue in *Schmitt;* rather than applying to all PAC's, the proposed limits apply only to corporate PAC's.

For opposing views on spending limits, see Fleishman, *supra* note 108, at 468 (noting that spending limits will have the undesirable effect of discriminating in favor of incumbents); Nicholson, *supra* note 108, at 847 (arguing that limiting expenditures is unconstitutional). For discussion of additional proposals aimed generally at political broadcast reform, see Fleishman, *supra* note 108, at 481 (suggesting that access to broadcasting media should be "scaled according to established eligibility criteria," and that "a floor of publicly subsidized broadcast time could be made available to non-frivolous candidates"); Nicholson, *supra* note 108 (proposing spending limits and subsidies for the use of broadcast media); Rosenthal, *Campaign Financing and the Constitution*, 9 HARV. J. ON LEGIS. 359 (1972) (arguing that spending limits and free time are constitutional); Wick, *supra* note 88, at 620-25 (declaring that the problems involved in devising an "acceptable formula" for providing all candidates with free broadcast time are not insurmountable).